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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. 258

DEAN MILK COMPANY, a corporation,

Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, **DR. C. K. KINCAID**, as Health Commissioner for the City of Madison, Wisconsin, **LEONARD HOWELL**, as City Manager of the City of Madison, Wisconsin, and **THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN**,

Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLANT'S REPLY BRIEF.

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Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLANT'S REPLY BRIEF.

I.

ISSUE INVOLVED.

Appellees denied appellant the right to sell milk in interstate commerce in Madison on the ground that its five mile limitation was *necessary* to protect the health of the citizens of Madison. In its original answer, appellees allege:

"13. Defendants further allege that the ordinances attached hereto as Exhibit 1, and especially including the portion thereof set forth in plaintiff's complaint (the five mile limitation) constitute *necessary*, reasonable and proper health regulations for the protection of the lives and health of the residents of the city of Madison. * * * (R. 204).

"15. Defendants are informed and verily believe that approximately 200 or more farms located chiefly in the state of Illinois many miles from Madison, furnish milk to the Chemung, Illinois, plant of the plaintiff. Because it is impractical to segregate in such a plant the milk from particular farms delivering to the plant, in order to be assured that standards of milk production, processing and transportation required by the Madison ordinances are maintained as to any milk delivered from such plant to the city of Madison, it would be *necessary* for the city health authorities regularly to inspect the said plant *and the* 200 *or more farms delivering to it*, even if 'the amount of milk from said plant sold in the city of Madison is very small, as defendants are informed and verily believe.' (R. 206).

"18. Changing economic conditions frequently may cause operators of dairy plants which serve other than established local markets, and particularly operators of plants which may have a variety of markets available to them, to shift from market to market from time to time, as defendants are informed and verily believe. If plants so operated and located at a distance from Madison are permitted to supply milk to Madison, such operations and the frequent fluctuation in inspection responsibilities of the City in the inspection of said plants and the farms supplying them would unreasonably burden the City of Madison." (R. 207-208).

Thus we have the reason in the appellees' original answer for denying the appellant the right to sell milk in interstate commerce in Madison.

It will be noted that their reasons are: First, that it was *necessary* that Madison inspectors inspect appellant's plants and *the farms* from which appellant obtained its milk. Second, that it was too big a burden for Madison to inspect the said plants and *farms,* and, third, because of changing economic conditions appellant might shift to some other market anyway.

In appellant's second amended complaint, appellant alleged:

> "That although the plaintiff made application on March 8th, 1948, for a license to sell milk in said city of Madison, the defendants have made no attempt to inspect the said farms from which the plaintiff obtains milk, or to inspect its plant or the vehicles in which said milk is transported, and have made no attempt to satisfy themselves that said milk was produced, pasteurized and transported pursuant to inspections of the city ordinance of the City of Chicago, Illinois, which has provisions equivalent to that of the City of Madison, Wisconsin, as above alleged; * * * that the defendants have taken no steps whatsoever to satisfy themselves as to the purity, quality and sanitation of the plaintiff's milk, and do not propose to do so, and claim that they have the right not to do so, and to bar the plaintiff from selling milk in the City of Madison, Wisconsin, because the plaintiff's milk is not pasteurized within the five mile zone." (R. 24-25.)

The appellees in their answer replied:

> "Defendants admit they have taken no steps to satisfy themselves as to the purity, quality or sanitation of the plaintiff's milk and further admit that

they do not propose to do so and that they claim they have the right not to do so and further have the right to refuse to grant any license to the plaintiff because the plaintiff's milk is not pasteurized within the five mile zone as provided in the Madison City Ordinances, and also for other reasons." (R. 40-41).

"Defendants deny that the health officer of the City of Madison could by any *means other than continual inspection* of the plaintiff's plants and of the *several hundred farms* which deliver to those plants satisfy himself that the plaintiff's milk is being produced, pasteurized and distributed in the manner required by the Ordinances of the City of Madison, and defendants allege that *such continual inspection would create undue expense and inconvenience to the City of Madison.*" (R. 42).

In Count Two of plaintiff's second amended complaint (which involved the 25 mile limitation), it reads:

"Upon information and belief plaintiff alleges that the health department of the City of Madison would refuse upon application to issue the permits, and that said action is arbitrary, discriminatory and unreasonable * * *. (R. 31).

In the appellees' answer, they replied:

"Defendants are informed and verily believe that approximately 800 or more farms, located chiefly in the State of Illinois many miles from Madison, furnish milk to the plants of plaintiff. Because it is impracticable to segregate in any plant, the milk from particular farms delivering to the plant, in order to be assured that standards of milk production, processing and transportation required by the Madison ordinances are maintained, as to any milk delivered from such plant to the City of Madison it would be *necessary* for the city health authorities

regularly to inspect the said plants and 800 or more farms delivering to them, even if the amount of milk from said plants sold in the City of Madison is very small, as defendants are informed and verily believe." (R. 45).

"If plants so operated and located at a distance from Madison are permitted to supply milk to Madison, such operations and the frequent fluctuation in inspection responsibilities of the City in the inspection of said plants and the farms supplying them would unreasonably burden the City of Madison." (R. 46).

"The defendants admit upon information and belief that the plaintiff does not own the farms from which it obtains the milk which it pasteurizes at its plants located at Chemung, Illinois and elsewhere; and that it obtains milk from approximately 900 different farms located in Northern Illinois and Southern Wisconsin and all farms are more than 25 miles from the City of Madison, and that plaintiff does not obtain milk from any farm located within 25 miles from the City of Madison."

"The defendants have no information or knowledge sufficient to form a belief as to whether the plaintiff's business is dependent upon obtaining milk from the milk producers located in Northern Illinois and Southern Wisconsin or whether the plaintiff is able, willing, or ready to have each of said owners of said farms where it obtains said milk make application to the City Health Department of Madison. *Any application by the said farm owners* to the City of Madison to deliver milk in Madison which milk has been pasteurized outside of the five milk pasteurization limit contained in Section 7.21 of the present Madison Ordinances *would be denied.*" (R. 48-49).

"Defendants allege that in view of the great supply of milk available within a radius of 25 miles from

> the Capitol Square of the City of Madison, the provision of the Madison Ordinance that the City need not inspect or issue permits to farms located beyond that radius is entirely reasonable and a proper health regulation and that said provision aids the effectiveness of inspection by the City Health Department and minimizes the cost thereof to the City and its tax payers." (R. 50).

Thus the issues are clearly drawn. They are, whether the five mile limitation and the twenty-five mile limitation were necessary to protect the health of the citizens of Madison. It further appears that Madison denied the application because milk was not pasteurized within the five mile zone, and the trial court found that to be the fact. (Finding 5, R. 53).

It further appears without dispute that the health officers of Madison refused to make any inspection or any investigation as to whether or not the plaintiff's milk complied with the health requirements of the Madison Ordinance, and further that they proposed not to do so.

It further appears that the plaintiff offered to have each of the 950 farms make an application for a permit, but the appellees' answer stated that even if the applications were made, that they would be denied.

It therefore follows that the statement in appellees' brief:

> "There is nothing in the record indicating what action the Madison Health Department would take on any applications for permits by Dean's Illinois producers if the milk were to be pasteurized within five miles of the Capitol Square in Madison, or if the five mile pasteurization should finally be held invalid,"

is contradicted by the record.

It further appears that appellees' constant repetition that it is is appellant's position, that the appellant would deprive a community of all right of inspection over its milk supplies is likewise not supported by the record.

The health officers of Madison have at all times been perfectly welcome to inspect every farm that sends milk to the Dean plants, to inspect the plants and make any other inspection that they deem necessary. The appellant makes no such contention, that the health officers of Madison may not inspect Dean's farms and plants. It is the appellant's position that its products meet the requirements of the Madison ordinance. Madison refuses to inspect the farms and plants, and to find out, saying it would create too heavy a burden. Then the appellant brought forth these other methods, which do not involve any financial burden.

One method is the reciprocal method set forth in Sec. 11 of the Model Milk Ordinance; another method is for the health officer to make spot checks of his own, just as the health officer from Janesville did, which is set forth on page 91 of the Record; another method would be to make inquiries among the health officers in the 200 cities in which Dean Milk Company sells milk. For example, the City of Kenosha has checked something like 500 farms and issued a permit on August 1st, 1949. (R. 82).

The health officer of Madison could also inquire at the Department of Agriculture of Wisconsin. That department picks up samples of milk and checks them. A number of checks are set forth in the record, and each check or test showed that Dean's Milk exceeded the requirements of the Madison Ordinance in both the butter fat content and the bacteria count. Madison allows a bac-

teria count of 30,000, and the test showed a bacteria count in Dean Milk of around 7000. (R. 83).

It is not the appellant's contention that this Court should declare that the minimum standards of the United States Model Milk Ordinance and Code shall be the maximum standards of any city or village milk ordinance in the country.

The question is, does Dean's milk comply with the health requirements of the Madison Ordinance? The record shows that it met the health requirements and exceeded the milk that was being sold and had been sold in Madison for years.

Appellees contend that the Madison Ordinance is an upward revision. Appellees point to the provision providing for cooling of the milk to 60 degrees after milking. The revised Model Milk Ordinance contains exactly the same provision, (R. 194) and that said provision was in full force and effect at the time of the trial. (R. 158). Dr. Kincaid, the chief health officer, admitted that the Model Milk Ordinance contained the same provision as the Madison Ordinance. (R. 73).

Further, it was shown at the trial that the purpose of cooling the milk was to keep the bacteria count, before pasteurizing, to 200,000 per c.c. Although the Chicago ordinance achieved the same thing by a slightly different method, it met the same requirement as to bacteria count, and for scientific purposes complied with the requirements of the Madison Ordinance. (R. 79). The same thing was testified to by appellees' witness Friday. (R. 124-125).

The trial court made *no* finding that the five mile limitation or the twenty-five mile limitation was a necessary health measure.

There was no proof that either of these limitations were health measures.

On the contrary, appellant produced testimony that such limitations are not necessary health measures.

Dr. W. J. Corbett testified that the five mile and twenty-five mile limitations were not necessary health measures. (R. 88).

H. J. Burger, Milk Sanitarian for Janesville, Wisconsin, a disinterested witness in this case, gave like testimony. (R. 89).

Dr. Fred B. Welch, health officer of Janesville, and a disinterested witness, testified in regard to such limitations:

> "I don't think such a limitation has any value at all in the protection of public health of the city as far as the milk supply is concerned." (R. 93).

Contrary to the impression that the appellees seek to leave, that the appellant would deny the health officers of Madison the right to inspect its farms and plants, the fact is that all of its records are kept available for inspectors, and its plant and farms are checked and inspected by many of the municipalities other than Chicago.

Dr. W. J. Corbett testified as to the tests that were made and kept on record. That part of his testimony begins near the bottom of page 82 of the Record, and on page 87 he testified:

> "Dean Milk Company has no objection to the City of Madison inspecting all of these farms, delivery trucks, pasteurization plants, and have no objection to anyone inspecting and our records are available and open to any municipality of the state." (R. 87).

James H. Davis testified of the tests and records of the farms that were made and kept of record. The testimony begins on page 97. At page 100 he testified:

> "One copy is usually left with the farmer and another copy filed with the plant. These records are available to any health officer who wants to inspect them. These records take up the health of the cows and follow the health code."

II.

The Five Mile and the Twenty-Five Mile Limitations Are Trade Barriers.

Appellees contend that the five mile limitation does not violate the Interstate Commerce Clause because they say that appellant is at liberty to locate a pasteurization plant within five miles of Madison. The difficulty with that contention and solution is that it is not economically possible to build a million dollar milk plant in every city and village. And further, appellant would not be allowed to use the plant unless it obtained its milk within the twenty-five mile radius.

The twenty-five mile limitation prohibits even the storage of milk obtained from a farm without a permit, and according to the defendants' answer, permits would not be issued to any farm located more than twenty-five miles from Madison.

The opinion of the Supreme Court of Wisconsin, which appellees are now defending, states:

> "The plaintiff contends that its inspection, with that of the Chicago Board of Health and spot checks by the United States Public Health Service, result in a product that is clean, pure and wholesome, and

> that it should be permitted to flow freely to market unburdened by duplication of inspection and that the restrictions in the Madison milk ordinance are prohibitive trade barriers and therefore unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause of the United States constitution. *The courts of some states have so held.*" (Italics ours.) (R. 292-293.)

The proof showed that those limitations are not health measures. They do have the effect of prohibiting interstate commerce. This Court said in the case of *Brimner* v. *Rebman,* 138 U.S. 78, 34 L.E. 862:

> "Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a state, is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore void."

Appellees make the contention that milk should be treated differently from other foods. The Courts, however, have not agreed with the appellees. In the case of *City of Greenville* v. *Cabells, Inc.,* (Tex.) 207 S.W. 2nd, 898, the Court states:

> "Milk and other dairy products are legitimate subjects of commerce, and the right to sell them should not be abridged by legislative bodies further than reasonable to protect and safeguard the public health."

Appellees ask the Court to take judicial knowledge that the meat business is national in scope and that the milk business is so local in nature that Congress could not set up an inspection service similar to meat. The proposition is untenable because it does not square with the facts. There are meat packing plants all over the country. They are not all located in Chicago and Kan-

sas City. On the other hand, fresh milk is shipped all over the country. In *Miller* v. *Williams,* 12 Fed. Supp. 236, which involved the City of Baltimore, the Health Officer complained that it was impossible to make frequent inspections of dairy plants in Wisconsin, but yet the Court struck down the 50 mile limitation. Dr. Fauerback, a witness for the appellees, testified:

> "Q. So that you heard the testimony, did you not, of Birmingham, Alabama, and those Southern cities obtaining milk up here?"
>
> "A. Yes, I did." (R. 137).

Dr. Fauerback further testified that the Southern cities were doing their duty legally in protecting the health of their citizens by trusting the inspection at the source of the milk (R. 138), forgetting, perhaps for the moment, his thesis about the personality element in inspection which appellees stress at great length in their brief.

Appellees ignore the fact that the State of Wisconsin by General Order 125 entitled:

> "Standards and Regulations for the Production and Processing of Milk and Milk Products for Interstate Shipment"

has recognized that milk is a subject of interstate commerce.

This Court stated in *H. P. Hood & Sons* v. *DuMond,* 336 U. S. 525, 535, 69 S. Ct. 657, 663:

> "The Court held that when a state recognized an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it."

Appellees ignore the further fact that Congress in the Agricultural Adjustment Act, Sec. 1, 8c (5) (G) as amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.A. Secs. 601, 608 (c) (5) (G) has recognized milk as a subject of interstate commerce for the purpose of stabilizing prices.

This Court stated in *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 544, 69 S. Ct. 657, 668 in regard to that act:

> "These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk."

It is not necessary to cite cases that milk is subject to contamination is not properly pasteurized and cared for. That is common knowledge. But the same is true of meat. Appellees' witness, Nichols, testified:

> "What I have said about milk being easily contaminated is also true of fresh meat. Fresh meat will be attacked by micro-organisms if it isn't preserved or sterilized." (R. 160).

There is perhaps some difference in degree, but fundamentally, the meat problem and the milk problem are about the same. Notwithstanding appellees' argument, we believe that Congress will be able to find words to convey its meaning in case it decides to extend milk regulation and supplant the work now being done by local inspectors. The Federal Government could appoint the local inspectors in lieu of the present program of grading and evaluating local inspection.

The "upward revisions" were not established. Appellees complain about our statement that Madison has been forced to drink ungraded milk for years and states:

> "The record contains no comparison of the quality of appellant's milk and of that sold in Madison."

Here is what Luchterhand, Chief Sanitarian for the State Board of Health, and appellees' witness, testified:

> "Milk sold in Madison today could not be labelled as Grade A under the United States Model Code, but it is my understanding that the local health department is bringing their producing farms and plants up so that they can obtain a Grade A label." (R. 158).

Dr. Kincaid, Madison Chief Health Officer, testified that of the farms supplying Madison:

> "We hope to have 90% complying within a year or so as to make it a Grade A shed. You never obtain 100% compliance in any milk shed." (R. 61).

Dean's Milk is Grade A. (R. 78, 195-196). Hence the record does contain a comparison and shows that Dean's milk excelled any that was being sold in Madison at the date of trial.

The trial court was of the opinion that it was immaterial whether the standards under which Dean's milk was produced were higher or lower than Madison's (R. 7).

Appellees profess difficulty with the word "wholesome." The Courts have encountered no such difficulty. The trial court stated, quoting in part from *Dyer* v. *Beloit*, 250 Wis. 613:

> "It can not be said that the city, in adopting the section in dispute (6 mile limitation on pasturization plants) arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian Ltd.* v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d), 884, where the

Court said that milk production is a legitimate business and so long as persons engaged in the business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, *which rule we do not adopt.*"

"It should be noted that the Supreme Court of Wisconsin, in the foregoing, *refuses* to adopt the rule laid down by the same court or courts, namely, that if the milk is 'a clean, pure and *wholesome* product', therefore it should be permitted to flow freely on the markets, 'unburdened by duplication of inspection and prohibitive trade barriers',—which is Dean's argument in almost its exact words, *infra.*"

This Court stated in *Baldwin* v. *Seelig*, 294 U.S. 511, 521, 55 S.Ct. 497, 499, 78 L.Ed. 1032:

"New York is equally without power to prohibit the introduction within her territory of milk of *wholesome* quality acquired in Vermont, whether at high prices or low ones * * *."

The meaning is clear. It is the position of the Wisconsin Court that artificial barriers may be erected regardless of what standards the outside milk may be capable of meeting.

Appellant's milk meets all the health standards in the present Madison Ordinance. (R. 82, 98). Milk being sold in Madison at the time of the trial did not. Appellees take the position that they can shut their eyes and ears and rest smugly behind the five mile and the twenty-five mile limitations. Their answer states that they have taken no steps to ascertain if appellant's milk meets the health requirements of the Madison Ordinance and that *they do not propose to do so.*

We submit their action is arbitrary and in violation of due process.

Counsel cites the case of *Dean Milk Company* v. *City of Chicago*, 385 Ill. 565, 53 N.E. (2d) 612, holding reasonable an ordinance banning paper bottles apparently for the purpose of showing that an arbitrary ordinance may be upheld by the Courts. Counsel apparently did not know the history of this matter. There was confusion as to the meaning of the ordinance, and whether Chicago had statutory power to enact it. This same ordinance was held unconstitutional in the case of *Fieldcrest Dairies* v. *City of Chicago*, 35 F. Supp. 451, (N.D.Ill.) and in the Seventh Circuit Court of Appeals, 122 F. (2d) 132. This court granted certiorari and in 316 U.S. 168, 62 S. Ct. 986, 86 L.Ed. 1355, held that the Federal Courts should defer their rulings until the Illinois State Courts had settled the meaning of the ordinance and Chicago's statutory powers to enact it. When the Illinois Supreme Court ruled, Chicago then amended its ordinance and permitted paper bottles. The Circuit Court of Appeal stated at page 139:

> "It is true the record discloses some evidence in support of defendants' contention that the use of such containers presents a hazard to health. *Such evidence, however, carries little, if any, conviction when considered in connection with the fact that the United States Public Health Service, whose model ordinance has been widely adopted by cities throughout the United States, including the City of Chicago, amended its ordinance in* 1939, *so as to include the regulation of single service containers, and that such amendment was subsequently proposed to the Council of the City of Chicago by its Board of Health;* that the Legislature of the State of Illinois and its Department of Health have approved the use of such containers since 1939, and that their use has been authorized and permitted by more than 200 cities and villages in the United States, including such

cities as Washington, D.C., New York and Philadelphia, as well as practically all of the cities and villages near and adjacent to the City of Chicago."

The situation is comparable to the case of *Dyer* v. *Beloit*, 250 Wis. 613. In that case, Beloit made the same claims that are now advanced by the appellees in the case at bar, i.e., the six mile limitation on pasteurization plants were a necessary health measure; that it would be burdensome to inspect Dean's plant and farms and that if Beloit was forced to inspect Dean's, then every milk dealer in the country could demand equal treatment, etc. This Court noted probable jurisdiction October 13, 1947, 68 S.Ct. 87. Thereafter, appellees filed affidavits confessing that they were wrong, and stating that a license had been issued to Dyer. Those affidavits are in the files of this Court in the case of *Dyer, Appellant* v. *City Council of Beloit, et al., Appellees*, No. 275, October Term, 1947.

Appellees stress the necessity of constant and close supervision over farms. Let us see how close and constant that supervision really is. For years the Madison milk shed has not measured up to a Grade A rating, and was unable to qualify as such at the time of the trial. The present Madison Ordinance provides for inspection of farms "at least every six (6) months", and dairy plants and receiving stations "at least monthly." (R. 244).

Inspecting a dairy farm every six months is not very "close and constant supervision."

On the other hand, Dean's farms are inspected every thirty days by Dean's inspectors. (R. 97). They are inspected by the Chicago Board of Health. (R. 80).

"Cities other than Chicago inspect Dean plants and run spot checks on the farms. The City of Kenosha, Wisconsin, recently checked a large number of farms, something like 500, and the City of Kenosha issued a permit to Dean Milk Company on August 1, 1949." (R. 82).

Then the United States Public Health Service evaluates the inspection service of the whole milk shed.

We will leave it to this Court to decide which set of farms is receiving "close and constant supervision."

Competition improves the quality of milk. This record is ample proof of that fact.

III.

Appellant Seeks to Have the Judgment of the Supreme Court of Wisconsin Reversed.

Under argument, appellees state in effect that appellant is seeking to have this Court deprive local governments of the power to establish health standards and to force them to accept as maximum standards the minimum standards suggested by the United States Public Health Service.

We are content to let our brief speak for itself. It does not and we do not ask this Court to assume the power of legislation. We have not asked this Court to rule on hypothetical cases, i.e., what the rule should be if other milk dealers beyond the 25 mile orbit sought admission. Appellees have sought to interject such matters in this case. The question before this Court is whether a local government can arbitrarily prohibit interstate commerce in milk by drawing arbitrary lines around it-

self. These lines are arbitrary because they are not health measures. They hurt the health situation instead of helping it. The statement that Madison does not have personnel enough in the Health Department to inspect appellant's farms and plants does not justify the arbitrarily geographical restrictions. Dr. Kincaid, Madison's Chief Health Officer, testified that its personnel would be insufficient to inspect Dean's farms and plants if they were located within the respective five mile and twenty-five mile limitation. (R. 68-69). Madison's refusal to inspect or to use other recognized and approved means to ascertain that Dean's milk complies with the Madison Ordinance is arbitrary. Having proved that Dean's milk complies with all health standards of the Madison Ordinance, we submit that appellant is entitled to a milk license and to have the judgment of the Wisconsin Supreme Court reversed.

This action was brought under the Declaratory Judgment Act. (See page 81 of our principal brief.) Under that Act, the Court confines itself to appellant's rights. The function of laying down rules and regulations for future cases lies in the field of legislation. The sole question here is whether or not Dean can sell milk in Madison in interstate commerce when the milk complies with all the health requirements of the Madison Ordinance or whether appellant can be barred by these arbitrary and unnecessary barriers.

IV.

Conclusion.

We submit that the judgment of the Supreme Court of Wisconsin should be reversed with directions to declare the two limitations null and void and to grant the prayer of the appellant's complaint.

Respectfully submitted,

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